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Date: December 13, 2017

To: San Francisco Ethics Commission

From: Pat Ford, Policy Analyst
Kyle Kundert, Senior Policy Analyst

Re: **AGENDA ITEM 6 - Staff Memorandum Updating the Commission on Proposed Rules Addressing Online Political Communications.**

Summary This Memo provides an overview of certain recently proposed rules regarding paid political content on the internet and Staff's proposed timeline for further analysis of the issue.

Action Requested Staff recommends that the Commission consider the information contained in this memo and provide its policy guidance regarding Staff's proposed process and timeline.

I. Introduction

On November 20, 2017, Vice-Chair Chiu, Commissioner Lee, and Staff met with former FEC chair Ann Ravel, UC Davis Law School professor Chris Elmendorf, and USC professor Abby Wood regarding a proposal by Ravel, Elmendorf, and Wood that the City implement new rules to address the increased use of the internet to disseminate paid political communications. Staff sought to arrange the meeting after Ravel, Elmendorf, and Wood published an op-ed in the Chronicle calling for new local rules on the topic. Members of the group have subsequently published papers further explaining their policy recommendations. Staff has done initial analysis of their proposals and has identified the concepts that present potential areas for Commission action. This memo is provided to enable the Commission to undertake, if it so desires, a process of further analysis over the next several months that would include input from additional experts and stakeholders in this arena.

Specifically, this memorandum explains the various concepts for new regulation proposed by Ravel, Elmendorf, and Wood and explains Staff's conclusions as to which concepts could be taken up for discussion by the Commission. The memorandum also lays out a potential timeline for a staff-led process of stakeholder engagement on the topic of online political communications.

II. Major Proposals by Ravel, Elmendorf, and Wood

- A. Require all providers of online communication platforms to archive information about paid political communications distributed through the platforms.

Ravel Proposal
Anytime a person pays an online platform to post, distribute, or otherwise publish a political communication, the platform would be required to archive certain data about the communication. A <i>political</i> communication would be any communication that relates to a matter before the City, including ordinances, regulations, and decisions by commissions or other bodies. The information the platform must archive would include the content of the communication, the amount paid to publish it, and the parameters used to target the communications to certain groups of viewers. The resulting archive would be available online to the public.
Staff Analysis
<p>This approach would be a major undertaking that has no known precedent. Although federal law has a similar “public file” requirement for political advertisements broadcast on television and other media, online platforms pose unique issues that any regulatory approach would need to take into account. Issues that need to be analyzed include:</p> <ul style="list-style-type: none">• How will platforms know what the current <i>political</i> issues in San Francisco are? Will the Commission have to provide a constantly updated list?• Do platforms have the capacity to actively review all paid communications to detect and archive those that are political? Even if they have such capacity, will they opt to not allow San Francisco political ads to be shown, rather than comply with the archiving requirement?• Does the Commission and/or the City have the authority to require archiving of all paid communications that pertain to City political issues, a category that goes beyond City candidates and ballot measures?• What unique issues are presented by each of the individual online platforms? How does any potential action by the Commission need to be tailored to these issues?
Recommended Action
<p>That the Commission direct Staff to conduct a process to fully analyze these and other issues to assist it in reaching a determination about whether an archive rule is a proper approach for the Commission to take. Staff proposes the following general timeline, with changes to be made as needed:</p> <p style="text-align: center;"><u>Timeline</u></p> <ul style="list-style-type: none">• <u>Month 1</u>- Conduct a stakeholder forum to solicit feedback and ideas from affected parties and subject matter experts.• <u>Month 2 (mid-month)</u>- At a regular meeting of the Commission, Staff will provide an update the Commission on the stakeholder forum and present any findings. Provide initial conclusions on the feasibility of an archiving rule.

- Month 3 – At a regular meeting of the Commission, Staff can present the Commission with policy analysis and options for regulating online political communications.

B. Strengthen the definition of *electioneering communication* to include internet communications.

Ravel Proposal
Ensure that electronic communications, including communications made through social media platforms, can fall under the City’s definition of <i>electioneering communication</i> .
Staff Analysis
No change is needed to achieve this effect. City law defines <i>electioneering communication</i> as “any communication, including but not limited to any broadcast, cable, satellite, radio, <i>electronic</i> , or telephone communication, and any mailing, flyer, door hanger, pamphlet, brochure, card, sign, billboard, facsimile, or printed advertisement” that “refers to a clearly identified candidate for City elective office” and “ is distributed within 90 days prior to an election ... to 500 or more individuals who are registered to vote” The term <i>electronic</i> would apply to social media, email, or other internet communications. Thus, these forms of communication can already be considered electioneering communications if they fulfill the other parameters regarding content and distribution. This particular proposal by Ravel, Elmendorf, and Wood is more applicable to federal law, which explicitly exempts “communications over the Internet, including electronic mail” from the definition of <i>electioneering communication</i> .
Recommended Action
No action needed. Staff will review the Commission’s associated regulations and outreach materials to ensure that the definition of electioneering communications is understood fully to be sufficiently broad to cover the activity contained in the Proposal.

C. Expand the electioneering communications window

Proposal
The period during which electioneering communication reports must be filed could be expanded, meaning that more reports would be filed.
Staff Analysis
Under current City law, a report must be filed for electioneering communications that are made within ninety days before an election. This is much broader than federal law, which use a thirty day window for primary elections and a sixty day window for general elections.

This particular proposal by Ravel, Elmendorf, and Wood is more applicable to federal law, since the windows under federal law are significantly shorter.

Recommended Action

Staff recommends that the Commission not pursue this approach.

D. Eliminate the “impracticability” exception for political advertisement disclaimers.

Ravel Proposal

State law requires certain advertisements to contain disclaimers stating that the advertisement is a paid advertisement and disclosing the identity of the person paying for the advertisement. If it is impracticable to include a full disclaimer in a particular electronic advertisement because of the nature of the technology used to distribute the advertisement, the advertisement may simply provide a link to a page with a full disclaimer. City law could effectively overwrite this exception by creating a local disclaimer rule that does not contain an impracticability exception.

Staff Analysis

This approach is not likely to result in a greater percentage of advertisements bearing advertisements. First, it is not clear how a full disclaimer could be included where it is impracticable to do so. Forms of advertising that cannot accommodate a disclaimer would effectively be prohibited. Also, state law always requires advertisements to, at the minimum, carry a link to a full disclaimer. This is likely a sufficient notice to viewers that the advertisement is paid and allows them to access a disclaimer.

This particular proposal by Ravel, Elmendorf, and Wood is more applicable to federal law, which includes a flat exception when it is impracticable to include a disclaimer (i.e. no link is required in place of a disclaimer).

Recommended Action

Staff recommends that the Commission not pursue this approach.

Next Steps

Staff recommends that the Commission consider the information contained in this memo and provide its policy guidance regarding how it wishes to proceed and on what timeline.